IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 4894 of 2001
with
Civil Application No. 12228 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARENDRABHAI CHHAGANBHAI BHARATIA

Versus

GANDEVI PEOPLES CO-OP BANK LTD

Appearance:
1. First Appeal No. 4894 of 2001
MR RN SHAH for appellant
MR JB PARDIWALA for Respondent No. 1
NOTICE SERVED BY DS for Respondents No. 2,4-5
UNSERVED-EXPIRED (N) for Respondent No. 3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 01/02/2002

ORAL JUDGEMENT

1. This appeal filed under Section 96 of the Code of Civil Procedure ('the Code' for short) is directed against the judgment and decree dated May 5, 2001

recorded in Special Civil Suit No. 43 of 2000 by the learned Civil Judge (S.D.)., Gandevi by which suit filed by respondent No.1 against the present appellant and respondent Nos.2 to 5 for relief of declaration that the sale deed registered on November 10, 1995 bearing registration No.1164 with the office of the Sub-Registrar in respect of the property mentioned in para 11 of the plaint executed by deceased Manekben Mohanlal Kansara and respondent Nos.2, 3 and 4 in favour of the appellant is in collusion with one another fraudulently with a malafide intention with a view to defeat the legitimate claim of respondent No. 1 bank of recovering its outstanding amount and, therefore, the said transaction is illegal, null and void and unenforceable, came to be decreed in favour of respondent No.1 bank.

2. Appellant is original defendant No.5, who is the only contesting party in this appeal, respondent No.1 bank is the plaintiff whereas respondent Nos. 2, 3, 4 and 5 are defendant Nos.1, 2, 3 and 4 respectively and for the sake of brevity and convenience parties hereinafter in this judgment will be referred to as "plaintiff bank" and "defendants".

3. By the consent of the learned advocates appearing for the parties, this appeal is decided at notice stage by calling record and proceedings from the lower court. Since defendant No.5 who has preferred this appeal is the only contesting party, rest of the defendant Nos.1, 3 and 4 though served with the notice elected to remain absent whereas defendant No.2 has expired and, therefore, it is decided to proceed with the matter in their absence.

4. Before highlighting the nature of controversy posed for my determination in this appeal, it is necessary to advert few but relevant facts of the case of the plaintiff bank and the defence of the defendants pleaded before the trial court in nutshell.

4.1. Plaintiff, a Co-operative bank registered under the provisions of the Gujarat Co-operative Societies Act ('the Act' for short), is engaged in banking business. Defendant Nos.1 and 2 had availed of loan facility from the plaintiff bank for the amount of Rs.30,000/- For recovery of the said amount of Rs.30,000/- the plaintiff bank had instituted Lavad Case No.115 of 1982 before the Board of Nominees at Surat. The Board of Nominees allowed the Lavad Case of the plaintiff bank and passed a decree against defendant Nos.1 and 2 for the sum of Rs.42,744/Thereafter the plaintiff bank preferred Special Execution Application No. 16 of 1990 in the Court of

learned Civil Judge (S.D.)., Navsari. On February 5, 1992 the decretal amount alongwith interest accrued thereon was fully paid up and, therefore, execution proceeding was withdrawn and accordingly the said Lavad Case No. 115 of 1982 came to an end.

4.2. For the second time, defendant Nos.1 and 2 availed of loan facility from the plaintiff bank but second time loan was prayed for in the name of partnership firm i.e., defendant No.4 by defendant Nos.1 and 2 as partners of the said firm. Defendant Nos.1 and 2 failed to pay the loan amount and, therefore, the plaintiff bank had instituted Lavad Case No. 184 of 1990 before the Board of Nominees at Surat for recovery of Rs.2,11,175/- with interest. On August 26, 1992 a decree was passed by the Board of Nominees wherein defendant Nos.1 and 2 as partners of the partnership firm agreed and undertook to pay Rs.15,000/per month to the plaintiff bank by way of monthly instalment and agreed to repay the amount in 24 monthly instalments. As per the said decree, on the basis of the settlement, on failure of the defendants to pay any one of the instalments it was open for the plaintiff bank to execute the decree against the defendants on their movable and immovable properties.

4.3. Despite the aforesaid decree passed by the Board of Nominees and undertaking given by defendant Nos.1 and 2 they did not make payment of a single instalment and as a result of this the plaintiff bank preferred Execution Application No.5 of 1993 in the Court of learned Civil Judge (S.D.)., Navsari for recovery of Rs.3,24,347.07 Ps. On filing the said execution application, an amount of Rs.30,500/- was paid in cash and Rs.1,15,451/- was recovered by the plaintiff bank by auctioning the machinery of the partnership firm. Even after recovering the said amount, still Rs.1,50,000/- was due from the defendants.

4.4. The plaintiff bank thereafter preferred one more application to the executing court requesting to grant permission under section 15 (1) of the Bombay Rent Act to attach and sale leasehold interest of the defendants in premises leased out for nonresidential purpose. Application Ex.92 preferred by the plaintiff bank was allowed by the executing court on September 4, 1998. The defendants, aggrieved thereby preferred Civil Revision Application before this Court which was also rejected. Thereafter the plaintiff bank preferred one more application Ex.75 praying that property which is the subject matter of the suit may be permitted to be attached and put to auction as the plaintiff bank was to

recover Rs.2,60,552.05. The learned trial Judge vide order dated October 20, 1995 passed an order under Order 21 Rule 54 below Ex.75 for issuing process and in the said proceeding defendant No.3 and mother of defendant Nos.1, 2 and 3, late Manekben gave an application Ex.86 praying that Manekben and Kusumben have share in the property sought to be attached and put to auction and therefore their share cannot be attached. Vide order dated January 12, 1996 the learned trial Judge passed an order that considering the circumstances due share of judgment debtor in property in question be attached and proceeded further. Thereafter again application Ex.88 was preferred by defendant No. 3 Kusumben Mohanlal praying for cancellation of the notice of declaration that as long as her share in the property is not separated the court may not proceed further and therefore necessary correction in the notification may be effected. The said application also came to be rejected.

4.5. Defendant No.3 thereafter preferred Civil Revision Application No. 601 of 1996 before this Court. During the pendency of the proceeding before this Court, defendant No.3 Kusumben made a statement that the property under attachment has already been sold and therefore the Civil Revision Application has become infructuous. Upon the statement made by her this Court has disposed of the said Civil Revision Application as having become infructuous.

4.6. Case of the plaintiff bank in the suit against which this appeal is filed is that after passing of the order by executing court below Ex.75 under Order 21 Rule 54 of the Code attaching the suit property, defendant Nos. 1, 2 and 3 and their late mother Manekben Mohanlal jointly sold off the suit property under Schedule in favour of defendant No.5, who happens to be the brother-in-law of defendant No.2 for consideration of Rs.80,000/by way of a registered sale deed and, therefore, it is the case of the plaintiff bank that defendant Nos.1, 2 and 3 despite knowing that the suit property has been attached by the executing court in Execution Proceeding No.5 of 1993 executed a sale deed in favour of defendant No.5, who is the brother-in-law of defendant No.2, with the sole intention to defeat the legitimate claim of the plaintiff bank. It is the case of the plaintiff bank that defendant No.5 also is a party to the fraudulent transfer and cannot be said to be a bonafide purchaser of property for value without notice. It is the case of the plaintiff that the said transaction is fraudulent as envisaged under Section 53 of the Transfer of Property Act, 1882 ('the TP Act' for short)

and hit by the doctrine of lis pendens envisaged under Section 52 of the TP Act and, therefore, the plaintiff bank filed the suit for declaration to which reference is made in earlier paragraphs of this judgment.

5. Defendant Nos.1 and 2 who are partners of defendant No.4 partnership firm, on being served, filed their written statement wherein inter alia they contended that their financial condition was bad and, therefore, they have sold the property to defendant No.5 in consideration of Rs.80,000/- and they have deposited the said sale proceeds with the plaintiff bank in connection with the Special Execution Application No.16 of 1990. In substance, their defence is that way back in the year 1992 during the pendency of Special Execution Petition No.16 of 1990 the property was sold out in favour of defendant No.5 in consideration of Rs.80,000/and, therefore, according to them when the deal was finalized and the amount was paid, no proceeding as mentioned in the suit particularly Special Execution Application No.5 of 1993 was pending and, therefore, transfer cannot be said to be fraudulent or with an intention to defeat the legitimate claim of the plaintiff bank and, therefore, they prayed to dismiss the suit.

6. So far as defendant No.5 is concerned, he has filed separate written statement wherein inter alia he has contended that he is a bonafide purchaser of the said property for value without notice and according to him he had no knowledge about the pendency of the Special Execution Application No.5 of 1993 and before executing the sale deed in his favour he has verified the Government record and as per the said record the title of the said property was clear and therefore he purchased the said property. He therefore prayed that the suit against him may be dismissed.

7. On pleadings of the parties, the learned trial Judge framed issues at Ex.34 and thereafter after recording ocular evidence consisting of the In-charge Manager on behalf of the plaintiff bank and defendant No.1 and considering the documents produced by the parties and considering the submissions advanced at the bar, came to the conclusion that the plaintiff bank has proved that the sale deed executed by defendant Nos.1, 2 and 3 and late Manekben Mohanlal, mother of defendant Nos.1, 2 and 3 in favour of defendant No.5 was with a view to defeat the legitimate and legal claim of the bank and therefore the said transaction is a fraudulent transfer within the meaning of Section 53 of TP Act. It is also held by the learned trial Judge that the said

sale is hit by the doctrine of lis pendens explained under the provisions of Section 52 of the TP Act. It is also held by the learned trial Judge that the sale is hit by Section 104 of the Gujarat Co-operative Societies Act ('the Act' for short) and therefore he has passed the decree as prayed for in favour of the plaintiff bank which has given rise to this appeal at the instance of defendant No.5 in whose favour the sale deed of the disputed property was executed. It is this finding of the learned trial Judge which is now on the anvil before this Court.

8. Mr. R.N. Shah, learned counsel for defendant No.5 contended that defendant No.5 is a bonafide purchaser for value without notice and sale deed executed in favour of defendant No.5 by original owner or vendor cannot be set aside only on the ground that the plaintiff bank has to recover some amount from defendant M/s. Shakti Metal Works. It is emphasised by the learned counsel that the sale proceeds of Rs.80,000/- has been already deposited in the bank in Execution Application No.16 of 1990, therefore, the suit filed by the plaintiff bank is not maintainable against defendant No.5. What is emphasised by the learned counsel is that the suit property is of joint ownership and there were four coparceners. Out of four coparceners, two female coparceners were not parties to the Lavad proceedings and, therefore, unless the said property is partitioned suit filed by the plaintiff bank is not maintainable against them. What is stressed by the learned counsel is that in Special Darkhast No.5 of 1993 defendant No.5 was not a party and, therefore, he was not informed about the order passed under Order 21 Rule 54 and therefore the sale deed dated November 10, 1995 cannot be cancelled. It is also pointed out by the learned counsel that disputed property was never mortgaged nor under attachment before judgment in Lavad Suit filed by the plaintiff bank and, therefore, the trial court ought not to have entertained the suit filed by the plaintiff bank. Mr. Shah further asserted that Sections 52 and 53 of the TP Act cannot be invoked in this case. To bring home the aforesaid submissions, learned counsel relied upon the following case law:

(i) Dev Raj Dogra and others v. Gyan Chand Jain and others, AIR 1981 SC 981 and

(ii) Rami Dahyabhai Somabhai v. Rami Jagjivan Motibhai and others, 19 GLR 737.

9. According to the learned counsel, decree passed

by the trial court against defendant No.5 is erroneous and bad in law and therefore deserves to be quashed and set aside by allowing this appeal and thereby dismissing the suit filed by the plaintiff bank.

10. Mr. J.B. Pardiwala, learned counsel for the plaintiff bank strenuously defended the judgment and decree passed by the learned trial Judge which is impugned in this appeal. It is emphasised by the learned counsel that on the facts and in the circumstances of the case, sections 52 and 53 of the TP Act can very well be attracted and there is ample evidence in this regard to attract the said sections. It is also stressed by the learned counsel that in the facts and in the circumstances of the case, sale is hit by section 104 of the Act which says that any private transfer or delivery of, or encumbrance or charge on, property made or created after the issue of the certificate of the Registrar, Liquidator, or Assistant Registrar, as the case may be under Section 103 shall be null and void as against the society on whose application the said certificate was issued. It is also pointed out by the learned counsel that the sale is hit by Section 64 of the Code of Civil Procedure ('the Code' for short) as well which envisages that where any attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment shall be void as against all claims enforceable under the attachment.

11. To canvass the proposition that the sale is hit by the doctrine of lis pendens envisaged under Section 52 of the TP Act, learned counsel has relied on the following case law:

i) Kedarnath Lal (dead) by his legal representative and another v. Sheonarayain and others AIR 1970 SC 1717
i) Gauri Dutt Maharaj v. Sukur Mohd. and another, AIR 1948 Privy Council 147
iii) Lov Raj Kumar v. Dr. Major Daya Shanker and others, AIR 1986 Delhi 364
iv) Raichand Gulabchand v. Dattatraya Shankar Mole and others, AIR 1964 Bombay 1.

12. To canvass the proposition that the sale of the disputed property is a fraudulent transfer under Section 53 of the TP Act, the learned counsel placed reliance on the following case law:

i) C. Abdul Shukoor Saheb v. Arji Papa Rao, AIR

1963 SC 1150 (paras 10 to 18)
ii) Sushilabehn and others v. Anandilal Bapalal and others, AIR 1983 Gujarat 126 (relevant paras 12 to 14)
iii) Seth Ghunsham Das and others v. Uma Pershad and others, AIR 1919 Privy Council 1919 page 6 (relevant P.S.Cs. 1 and 2)
iv) Bachan Ssingh Harnam Singh v. Banarsi Das Hari Ram and another, AIR 1961 Punjab 361 (relevant para 5)
v) Prasad and others v. V. Govindaswami Mudaliar and others, AIR 1982 SC 84 (relevant paras 54 and 56)
vi) Rambilas Sitaram v. Ganpatrao Pandharinath and others, AIR 1954 Nagpur 129 (relevant paras 13, 15, 16, 17, 24, 25, 26 and 27).

13. On the aforesaid premises, it is vehemently contended by the learned counsel that the learned trial Judge has considered all these aspects and passed the decree as prayed for which does not warrant any interference at the hands of this Court in exercise of power under Section 96 of the Code as there is no substance in this appeal and according to the learned counsel the appeal therefore deserves to be dismissed with costs.

14. At the outset it may be stated that there is no dispute about the fact that defendant Nos.1 and 2 had taken loan of Rs.30,000/- from the plaintiff bank and since the said amount was not paid the bank had instituted Lavad Suit No.115 of 1982 before the Board of Nominees, Surat and the said suit came to be decreed against defendant Nos.1 and 2 for a sum of Rs.42,744/- To recover the said amount, Special Execution Petition No.16 of 1990 was filed in the Court of the learned Civil Judge (S.D.)., Navsari. Defendant No.1 has paid the entire decretal amount on February 2, 1992 and, therefore, the Darkhast Proceeding which was an offshoot of the Lavad Suit No.115 of 1982 came to an end.

15. There is also no dispute that defendant Nos.1 and 2 had for the second time availed of loan facility and since defendant Nos.1 and 2 failed to repay the loan amount the plaintiff bank had to institute Lavad Case No.184 of 1990 before the Board of Nominees at Surat for recovery of Rs.2,11,175/- with interest. In the said Lavad Suit, a consent decree was passed by the Board of Nominees on August 26, 1992 wherein defendant Nos.1 and 2 as partners of the partnership firm agreed and undertook to pay Rs.15,000/- per month to the bank by way of monthly instalment. Notwithstanding the aforesaid consensual arrangement, defendant Nos.1 and 2 did not pay a single instalment which has compelled the plaintiff

bank to file Special Darkhast No. 5 of 1993 in the Court of Civil Judge (S.D.)., Navsari for recovery of Rs.3,24,347.07 Ps. against defendant Nos.1 and 2 as partners of the partnership firm. After institution of the execution application, Rs.30,500/- in cash was recovered by the plaintiff bank and by auctioning the machinery of the partnership firm Rs.1,45,000/- was also recovered. Even after recovery of the above said amount, an amount of Rs.1,50,000/- remained outstanding from defendant Nos.1 and 2 as partners of the partnership firm.

16. On reassessment and reevaluation of the evidence produced and adduced by the parties before the trial court by me, I noticed the following aspects, which were even surfaced in the finding recorded by the trial court, which Mr. R.N. Shah, learned advocate for defendant No.5 could not dislodge:

a) The case put forward by defendant Nos.1 and 2 that in the year 1990 there was a deal of oral sale and pursuant to that defendant No.5 paid Rs.80,000/- towards the sale proceeds of the suit property directly to the plaintiff bank to clear off the dues payable to the plaintiff bank in connection with Lavad Case No. 16 of 1990 without any agreement for sale or anything else to show except bald assertion, is unbelievable. The payment aspect is not satisfactorily proved and the defence is on the contrary proved false on perusal of the documentary evidence adduced by defendant No.5 in the form of books of accounts, etc.

b) Defendant Nos.1, 2 and 3 executed sale deed in favour of defendant No.5 who happens to be the brother-in-law of defendant No.2.

c) Though the deal is said to have been finalised in the year 1992 the sale deed was executed in November 1995. No plausible explanation is put forward by the defendants, more particularly by defendant No.5 for the same.

d) Even after the alleged payment of Rs.80,000/towards the sale of the suit property is said to have been made by defendant No.5, defendant Nos.1 and 2 are still residing in the suit property till this date.

e) All taxes and other bills like electricity, etc., of the suit property are being paid by defendant Nos.1 and 2.

f) Despite sale being shown there is no mutation entry regarding the same in the City Survey Record in favour of defendant No.5.

g) Defendant No.5 is a permanent resident of Pardi and is carrying on business at Pardi since last 40 to 50 years and had no reason to buy property at Gandevi.

h) Defence of defendant Nos.1 and 2 that they are still in the suit property as tenants of defendant No.5 has been found to be false. This is not their case even in the written statement. They have admitted in the evidence that they have nothing to show on paper that they are tenants in the suit property of defendant No.5. They have admitted that they do not have any rent note or any receipt of payment of rent.

17. Keeping in view the aforesaid unimpeachable aspects which are noticed by this Court on reappreciation and reevaluation of the evidence which are also narrated by the learned trial Judge in his judgment, now let us examine the scope and ambit of Sections 52 and 53 of the TP Act.

18. To examine the scope of Section 52 of the TP Act, now let us first have a glance of Section 52 of the TP Act which reads as under:

> "52. Transfer of property pending suit relating therein.-- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> Explanation.-- For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree

or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force".

19. On having fair look to the aforesaid provisions, there is no manner of doubt that to attract the said provisions it must be shown that:

i) The suit is pending in one of the Courts;

ii) The suit is not collusive;

iii) That is a suit in which any right to immoveable property is directly and specifically in question and;

iv) Property is transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be made therein. Explanation to Section 52 makes it clear that the suit would be said to be pending till complete satisfaction or discharge of such decree or order has been obtained.

20. The principle underlying the object of the aforesaid provision is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The principles contained in this section are in accordance with the principle of equity, good conscience or justice because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Allowing alienations made during pendency of a suit or an action to defeat rights of a plaintiff bank will be paying premium to cleverness of a defendant and thus defeat the ends of justice and throw away all principles of equity.

21. In Kedarnath Lal's case (supra) the Supreme Court has said that it is true that Section 52 of the TP Act strictly speaking, does not apply to involuntary alienations such as Court sales but it is well established that the principle of lis pendens applies to such alienations. For coming to the aforesaid conclusion, the Supreme Court has relied on its previous decision in the case of Samarendra Nath Sinha v. Krishna Kumar Nag, AIR 1967 SC 1440. It is also held in the said decision that the doctrine of lis pendens applies irrespective of strength or weakness of the case on one side or other. There is, however, one condition that

proceedings must be bona fide. If proceedings are bona fide, applicability of Section 52 of the TP Act was not avoided. For coming to the aforesaid conclusion, the Supreme Court has relied upon the judgment of the Privy Council in the case of Gauri Dutta Maharaj's case (supra).

22. In Lov Rajkumar's case (supra), Delhi High Court has held that even if it is taken for granted that the provisions of Section 52 of the TP Act were not applicable as such, the principles contained in it were applicable. The principles contained in Section 52 are in accordance with the principle of equity, good conscience and justice and it is well established that wherever Transfer of Property Act is not applicable, such principles in the provisions of the said Act, which are based on justice, equity and good conscience, are applicable.

23. In Raichand Gulabchand's case (supra) High Court of Mumbai has held that it is true that though by the making of the decree there was no lis, still once the application for execution is filed and proceeding commenced, the property becomes the subject-matter in dispute and, therefore, it may fall within the meaning of "the proceeding in respect of the property".

24. From the ratio laid down in the aforesaid judgments of the Supreme Court, Delhi High Court, Privy Council and Mumbai High Court, following salient features of Section 52 of the TP Act can be culled out:

i) Even if it is taken for granted that the provisions of Section 52 of the TP Act were not applicable as such, the principles contained in it were applicable. It is well established that wherever TP Act is not applicable, such principles in the provisions of the said Act, which are based on justice, equity and good conscience are applicable.

ii) The applicability of Section 52 of the TP Act cannot depend on matters of proof or strength or weakness of the case on one side or the other in bonafide proceedings. To apply any such test is to misconceive the object of the enactment.

iii) In the case of a transfer which is hit by the doctrine of lis pendens under Section 52 of the TP Act the question of good faith which is essential to be established before an equitable

relief can be granted in favour of a subsequent vendee under Section 41 or Section 51 of the TP Act is totally irrelevant.

iv) Though by the making of the decree there was no lis, still once the application for execution is filed and proceeding commenced, the property becomes the subject-matter in dispute and, therefore, it may fall within the meaning of "the proceeding in respect of the property".

25. In Dev Raj Dogra's case (supra) an outside auction-purchaser was seeking recovery of the physical possession of the property purchased by him at the auction from the tenants who were in possession of different portions of the said premises as tenants of the said portions. The auction purchaser in that case was not the mortgagee and was no party to the suit in which compromise decree was passed. Section 52 of the TP Act in clear terms speaks of the rights of the parties to the suit or proceeding. In that fact situation, the Supreme Court has held that the auction purchaser who was an outsider and was not a party to the suit resulting in the compromise decree in execution of which the property was put up for sale, was not entitled to recover physical possession from the tenants in view of the provisions contained Order XXI Rule 95 of the Code of Civil Procedure in respect of the portions in occupation of the tenants. Therefore, this judgment is of no avail to defendant No.5.

26. Similarly, judgment in the case of Rami Dahyabhai (supra) relied upon by Mr. R.N. Shah, learned advocate for the defendant No.5, is also not applicable to the facts of the present case. In the said case, there was no dispute interse between the plaintiff. Transfer of undivided share of the first plaintiff not affecting in any way the rights of other plaintiffs - Transfer of such property cannot be turned down under section 52 of the TP Act. In the said case, the fact situation was such that stranger purchaser who was in actual possession of the property as a tenant against whom decree for eviction was also passed. Therefore, the question before the Court was that whether such a purchaser who was a tenant against whom the decree was passed was entitled to joint possession as he was already in possession. The Court held that the joint possession cannot be given under Section 44 of the TP Act and in such case the proper course would be to advise the tenant to file suit for partition and obtain interim relief in the meantime against eviction. Therefore, this judgment is also no

avail to the defendant No.5 in the facts of the present case.

27. In view of the discussion made hereinabove, more particularly in foregoing para 16 wherein this Court has recorded the aspects from (a) to (h) which, according to this Court are unimpeachable and could not be dislodged by Mr. R.N. Shah, learned advocate for defendant No.5 and relying upon the judgments of the Supreme Court and various High Courts and the salient features of SEction 52 of the TP Act, at the cost of repetition, be it stated that it is true that while filing Lavad Suit No.184 of 1990 before the Board of Nominees, Surat by the plaintiff bank against the defendants, the property was not attached by way of attachment before judgment. Thereafter consent decree came to be passed on August 26, 1992 but inspite of that as per the terms and conditions of the decree, not a single instalment was paid by the defendants. Therefore Darkhast proceeding was initiated by filing Regular Darkhast No. 5 of 1993. In the said Darkhast, an application vide Ex.75 was submitted by the plaintiff bank for taking disputed property in attachment with the aid of Order 21 Rule 54 of the Code. The learned Civil Judge (S.D.)., vide order dated October 20, 1995 issued process under Order 21 Rule 54 of the Code and thereby attached the said property. Thereafter application Ex.86 was submitted by the defendants contending that deceased Manekben and Kusumben are have their share in the property which is sought to be attached and put to auction and, therefore, their share cannot be attached. On January 12, 1996, the Civil Judge (S.D.)., Navsari has modified his previous order recorded below application Ex.75 and passed an order that considering the circumstances, due share of judgment debtor in the property in question be attached and proceeded further. Thereafter application Ex.88 was tendered by defendant No.3 Kusumben praying for cancellation of the notice of declaration contending that as long as her share in the property is not separated, Court may not proceed further. The learned trial Judge vide order dated March 22, 1996 rejected the said application. In sum and substance by passing the order dated October 20, 1995 below application Ex.75 of Execution Application No.5 of 1993, the learned Civil Judge (S.D.)., Navsari put the property in question under attachment under Order 21 Rule 54 of the Code. Thus, property in question becomes the subject matter in dispute and, therefore, it falls within the meaning of the proceedings in respect of the property. Admittedly the sale deed in favour of defendant No.5 was executed on November 10, 1995 which is subsequent to the order passed

by the trial Court below application Ex.75. Therefore, there cannot be any dispute that when the sale deed came to be executed there was a lis pending between the plaintiff bank and the defendants, and therefore, doctrine of lis pendens is applicable to the facts of the present case.

28. After having examined the scope of Section 52 of the TP Act, now let us analyse the scope of Section 53 of the TP Act which deals with fraudulent transfer. Section 53 of the TP Act reads as under:

> "53. Fraudulent transfer.-- (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.
>
> Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.
>
> Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.
>
> A suit instituted by a creditor which term includes a decree-holder whether he has or has not applied for execution of his decree to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.
>
> (2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.
>
> For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

29. On having fair look to the aforesaid provisions, there is no manner of doubt that to attract the said provisions, plaintiff bank has to prima facie establish that the sale was sham, pretended sale without any consideration and not intended to pass any title to the nominal purchaser and in the alternative that even if it were a real transaction supported by consideration and intended to pass title to the plaintiff bank, still the same was, having regard to the circumstances stated in the plaint, a fraud upon the plaintiff bank and, therefore, voidable at the instance of the plaintiff

bank. Even if the sale in favour of defendant No.5 was real, the sale was intended by the transferor to defeat or delay the creditors. The onus of proof in a suit lies on the plaintiff bank and the plaintiff bank must plead and prove the circumstances to discharge this onus. If he makes out prima facie case of fraudulent intention, the burden shifts to the transferee to prove his good faith. It is essentially necessary that the facts should be considered in relation to each other and weighed as a whole where the question for determination is whether a transfer is a bonafide transaction entered into with the object of securing the debt of transferee or whether it is a mere contrivance for defeating or delaying the just claims of the other creditors and retaining the properties for the benefit of or in trust for transferor.

30. The circumstances which have been narrated emerging from the evidence on record lead one to draw an irresistible inference that defendant Nos.1, 2, 3 and their mother executed the sale deed of the suit property in favour of defendant No.5 pending the attachment of the suit property was only with the intention of defeating the rightful claim of the plaintiff bank and stopping them or making it impossible for them to proceed further with the auction of the suit property. It may be noted that defendant Nos.1, 2 and 3 as transferor and defendant No.5 as transferee have tried to give some explanation and each of the circumstances might be capable of some explanation consistent with the case that the transfer impugned was effected in the normal and ordinary course of business for some purpose which did not involve an intention to defeat or delay the creditors but the question we have to consider is their cumulative effect, and so viewed, the conclusion appears irresistible that the object of the transaction was to put the property out of the reach of the creditors. The transfer was, therefore, plainly within the terms of the first paragraph of Section 53 (1) of the TP Act and is voidable at the instance of the plaintiff bank who is a decree holder. From these circumstances, there is reason to believe that defendant No.5 must be fixed with notice of the design in pursuance of which the transfer was effected. If the object of a transferor who is heavily indebted was to convert his immovable property into cash for keeping it away from his creditors and knowing it the transferee helped him to achieve that purpose, it has naturally to be held that he shared that intention and was himself a party to the fraud.

31. Supreme Court in C. Abdul Shukoor Saheb's case (supra) held that where fraud on the part of the

transferor is established by the terms of paragraph (1) of S. 53 being satisfied, the burden of proving that the transferee fell within the exception is upon him and in order to succeed he must establish that he was not a party to the design of the transferor and that he did not share the intention with which the transfer had been effected but that he took the sale honestly believing that the transfer was in the ordinary and normal course of business. After discussing the facts of the case, it is further held that in the circumstances, it stood to reason that the transferee must be fixed with notice of the design in pursuance of which the transfer was effected. If the object of a transferor who is heavily indebted was to converting his immoveable property into cash for keeping it away from his creditors and knowing it the transferee helped him to achieve that purpose it has naturally to be held that he shared that intention and was himself a party to the fraud. Thus the transferee was not a transferee in good faith and the transfer was a scheme by the transferor with the knowledge and concurrence of the transferee to put the property out of the reach of the creditors.

32. In Sushilabehn's case (supra), Division Bench of this Court has held that even assuming that partition in a Hindu family and release deed by a coparcener in favour of other coparceners in respect of his share does not amount to a transfer, within the meaning of the term 'transfer of property' as prescribed in section 5 and therefore, not within the purview of Section 53 of the TP Act. The principle of Section 53 of the TP Act can be invoked and would apply even though the section may not apply to terms since the principle underlying it is of wider application and Section 53 is not exhaustive. If the object of a given instrument of a partition or a release deed is not surely to give to a sharer his rightful share in the family properties but to defect a partition in such a way that such a sharer would be able to defeat the creditors, it would amount to a fraudulent partition.

33. In Seth Ghanshyam Das's case (supra), Privy Council has held that it is essentially necessary that the facts should be considered in relation to each other and weighed as a whole where the question for determination is whether a transfer is a bona fide transaction entered into with the object of securing the debt of transferee or whether it is a mere contrivance for defeating or delaying the just claims of the other creditors and retaining the properties for the benefit of or in trust for transferor.

34. In Bachan Singh Harnam Singh's case (supra), Punjab High Court in paragraph 5 of the judgment has observed as under:

"However suspicious a transaction, the Court's decision must always be based on legal grounds, legally brought on the record, and it must never rest on suspicious or on the Courts' mere moral convictions. The burden of successfully assailing a transaction initially lies on the creditors. When the creditors have established facts, which show the prima facie intention of the debtor to defeat or delay the creditors, it is then for the debtor to meet the case made out and to explain the facts. According to general law, a man is presumed to intend the natural consequences of his acts, and that, fraud, from its very nature, has necessarily to be established by circumstantial evidence. The facts, which mitigate against the bona fides of a transaction and whose cumulative effect establishes fraud, are many and varied. Unexplained secrecy is by and large, considered to be a badge of fraud, whereas notoriety might well rebut a presumption of fraud. Though all facts are to be considered cumulatively, yet the facts that the debtor is in embarrassed circumstances (proceedings for attachment of his property having been initiated) and the transaction is between close relations, who are otherwise not shown to be inimical to each other may constitute good prima facie evidence of fraudulent intention: this would be still more so, when the entire property has been transferred by the debtor and no reliable evidence of the bona fides of the transferee has been placed on the record. The subsequent conduct of the vendee in not taking necessary steps for getting the requisite mutations entered in the revenue papers, is also not wholly unimportant in determining the fraudulent intent and the existence of collusion between the parties. A transaction, which does, in fact, result in defeating and delaying the existing creditors may legitimately be presumed to have been made with the intention of causing the above consequence, and this rule would perhaps be equally applicable even when there is only a single creditor of the debtor and he has been so defeated and delayed."

35. In Prasad's case (supra), the Supreme Court has held that where the sale deed is not supported by adequate consideration and the document is executed nominally with a view to stave off creditors in such cases transaction should be held to be vitiated in view of the provisions of Section 53 of the TP Act.

36. In Rambilas Sitaram's case (supra), Nagpur High Court has held that the burden of proof in a suit under Section 53 of the TP Act that the alienation was made with a view to defeat or delay the creditors is on the plaintiff. Plaintiff must plead and prove circumstances to discharge this onus. If he makes out a 'prima facie' case of fraudulent intention, the burden shifts on to the transferee to prove his good faith. It is further held that transfer by sale in favour of father-in-law property worth much more than price stated- Consideration being payment of mortgage debt which had not become due - No legal necessity for alienation - Subsequent payments towards mortgage made by transferor who continued in possession - Story of lease not believed - Held that prima facie case of intention to defeat and defraud creditors was made out. Transfer held not in good faith or for consideration.

37. Applying the principles enunciated by the Supreme Court and various High Courts as referred to above to the facts of the present case, coupled with the evidence adduced and produced by the parties, there is no manner of doubt that the transaction of the disputed property entered into between defendant Nos.1, 2, 3 and their deceased mother with defendant No.5 clearly falls within the purview of Section 53 of the TP Act as it is a fraudulent transfer just with a view to defeat the claim of the plaintiff bank. The circumstances narrated in para 16 above unequivocally establish that the said transaction is a fraudulent transaction and on cumulative effect of the evidence the irresistible conclusion is that the object of the transaction was to put the property out of the reach of the plaintiff bank.

38. Seen in the above context, the execution of the sale deed dated November 10, 1995 executed by defendant Nos.1, 2, 3 and their deceased mother Manekben in favour of defendant No.5 is hit by provisions of Section 52 of the TP Act, that is, doctrine of lis pendens as on that day lis with respect to the said property was pending before the learned Civil Judge (S.D.)., Navsari pursuant to the order passed in Execution Application No.5 of 1993 between the plaintiff bank and defendant Nos.1, 2 and 4. There is also ample evidence that the said transaction

was a fraudulent transfer within the meaning of Section 53 of the TP Act to defeat the plaintiff bank's claim and to put the property out of the reach of the plaintiff bank and, therefore, the learned trial Judge has very rightly held in favour of the plaintiff bank and passed the decree as prayed for. Therefore, I do not find any valid reason to interfere with the impugned judgment decree passed by the learned trial Judge in favour of the plaintiff bank. Hence the appeal deserves to be dismissed at its inception i.e., at admission stage.

39. For the foregoing reasons, the appeal fails and accordingly it is dismissed at the threshold. Notice is discharged with no order as to costs.

40. As the First Appeal is dismissed summarily, Civil Application No.12228 of 2001 for stay also stands rejected. Notice is discharged. Ad-interim relief granted earlier shall stand vacated.

(A.M. Kapadia, J.)